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Supreme Court, U.S.
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No. 98-1054

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VISALAKSHI MALLADI,
Petitioner,

v.

TOGO WEST, JR.,
in his official capacity as Secretary,
Department of Veterans Affairs,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial judge's refusal to reopen seven (7) EEO complaints underlying a global settlement agreement violated this Court's position in *Raley v. Ohio*, 360 U.S. 423 (1959)?

2. Whether the trial judge incorrectly applied the *McDonnell Douglas* "circumstantial evidence" analysis to the Plaintiff's Title VII retaliation claim instead of the "direct evidence" analysis?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
ARGUMENT	2
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970)	3
Heckler v. Community Health Services, 467 U.S. 51 (1984)	2, 3
Humphrey v. Erie R. Co., 116 F. Supp. 660 (DC NY 1953)	3
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	4
Raley v. Ohio, 360 U.S. 423 (1959)	2
Rollins v. State of Florida Dept. of Law Enforcement, 868 F.2d 397 (11th Cir. 1989)	3, 4
St. Regis Paper Co. v. United States, 368 U.S. 208 (1961)	3
Standard Oil Co. v. Myers, 232 Ala. 662, 169 So. 312 (1936)	3
Valley Properties Inc. v. Strahan, 565 So. 2d 571 (Ala. 1990)	3

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 2a-59a) is reported at 987 F. Supp. 893.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1998. A petition for rehearing was denied on October 2, 1998 (Pet. App. 61a). The petition of a writ of certiorari was filed on December 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This reply brief is filed by the Petitioner in response to the "Brief for the Respondent in Opposition", and is filed pursuant to Supreme Court Rule 15.6., which provides that any petitioner "may file a reply brief addressed to new points raised in the brief in opposition. . . ."

At page 3 of the Respondent's brief, he contends that "the VA . . . assigned a committee of doctors culled from other VA offices to conduct the external review" and cites certain negative findings of that "committee." Actually, the review team consisted of only one physician and one coordinator who was a recreation specialist and not a physician. Pet. p. 4. As to the summarized "findings" of that team alluded to at page 3 of the Respondent's brief, the record reflects that Dr. Malladi responded to and refuted each of them. (R3-62, Exh. A, pp. 37-40, Atch 27). The team's references to complaints about Dr. Malladi's conduct were refuted when the medical center director, on December 20, 1995 and on January 22, 1996, provided memoranda stating that there were *no* complaints on file about her conduct. (*Id.*, Atch 29).

ARGUMENT

The decision of the courts below should be visited by this Court as being inconsistent with its prior decisions upon the issues of contract law and the "direct evidence" test.

1. In his brief in opposition, the Respondent has attempted to distinguish the case of *Raley v. Ohio*, 360 U.S. 423 (1959), by pointing out that in *Raley*, the petitioner had been subjected to criminal prosecution and had sought to invoke rights under the Fourteenth Amendment. Actually, *Raley* stands for the broader proposition that government should not be allowed to achieve a goal by resorting to tactics that constitute "active misleading." (*Id.* 360 U.S. at 438). This principle was also discussed in *Heckler v. Community Health Services*, 467 U.S. 51,

61 (1984), where this Court acknowledged that the government could be subjected to estoppel principles where citizens countervailing interests in a "minimum standard of decency, honor, and reliability in their dealing with their Government" were involved. The Court in *Heckler* quoted *inter alia*, from the case of *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970), to this effect that "To say to these appellants, 'the joke is on you. You shouldn't have trusted us', is hardly worthy of our great government."

In the instant case, all elements of estoppel are present, because the Petitioner surrendered her rights under seven (7) EEO claims in return for the government's promise to reopen them if it did not discharge its responsibilities under the agreement. The Equal Employment Opportunity Commission found, and the district court, albeit reluctantly, agreed, that the VA failed to discharge its obligation to provide management training to Dr. Malladi. The resort to elements of law relating to breaches of contract, as the lower courts have done, has effectively supported the VA in its active misrepresentation to Dr. Malladi. As Justice Black has said in his dissenting opinion in *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961):

> "Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do."

Finally, even if the courts do elect to apply the law of contracts rigidly, it is generally held that misleading representations, even if innocently made, are sufficient to invalidate an agreement. See cases cited at 71 ALR 2d 118. *Humphrey v. Erie R. Co.*, 116 F. Supp. 660 (DC NY 1953); *Valley Properties Inc. v. Strahan*, 565 So. 2d 571 (Ala. 1990); *Standard Oil Co. v. Myers*, 232 Ala. 662, 169 So. 312 (1936).

In rejecting the Petitioner's claims of retaliation in this case, the lower courts have relied upon *Rollins v. State of*

Florida Dept. of Law Enforcement, 868 F.2d 397, 401 (11th Cir. 1989). The *Rollins* case is clearly distinguishable from this case, because the court there noted that Rollins had "disrupted the workplace by repeatedly making spurious claims of racially disparate treatment *in an extremely hostile and antagonistic manner.*" 868 F.2d at 398. (Emphasis added). There is absolutely no evidence in this case that Dr. Malladi *ever* acted in "an extremely hostile and antagonistic manner." As to the volume of her complaints, she waives what she does not file. The VA obviously did not view her first seven (7) charges as frivolous, because it settled them on terms favorable to Dr. Malladi (Pet. App. p. 6a), and the trial court has acknowledged that she made out a *prima facie* case of retaliation in her final two charges. (Pet. App. pp. 49a-50a).

2. At pages 8 and 9 of his brief, the Respondent argues that the lower courts correctly applied the indirect evidence, burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In so doing, he argues that the site visit reference to the EEO filings contain "merely passing mentions" of them, and that such reference "in no way constitutes direct evidence that the few references to petitioner's EEO complaints contained in the reports themselves influenced this action." While that argument might have been appropriate to present to a jury, it widely misses the mark upon the question of the issuance of a summary judgment. At the very least, the evidence presented regarding the effect of the EEO filings in the site visit report upon the treatment received by Dr. Malladi was due to be presented to a jury.

The trial court has conceded that "the request for the site visit and the site visit itself, began the steps that led to Malladi's detail, to the negative site visit team report, and to her reduction in pay, all of which no doubt had a serious impact on the terms and conditions of her employment." (Pet. App. p. 46a). A review of the evidence

regarding the site visit report's reference to the EEO filings and its effect on the VA's decision to detail and transfer Dr. Malladi reveals the following facts:

In spite of Dr. Malladi's successful performance on a recent review by the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), and in spite of her recent "high satisfactory" to "outstanding" proficiency ratings, the medical center director requested the external review or site visit, which was conducted on December 14-15, 1995. (R3-62, Exh. A, pp. 1-2; R2-48, Exh. D, Atch 6). The stated purpose of the external review "was to review the clinical and administrative operation of the PM&RS Service, employee-management concerns, and to make recommendations to improve total service operation and morale." (*Id.*) Prior to their arrival on station at the TVAMC, the program reviewers, Dr. Leigh Anderson and Mr. John Jacobson, requested among other things, "[c]opies of all formal complaints, reports of contact, or grievances filed in the last 3 years . . . as they relate to the duties of the chief of PM&RS or other PM&RS staff." (R3-62-29, Exh. D). Upon their arrival at Tuskegee, the agenda established for their visit clearly indicates that they met with Dr. Tirado, the EEO manager at Tuskegee VAMC, immediately after they met with the medical center director, the chief of staff and the associate director (the "Triad"), and prior to their meeting with Dr. Malladi. (R3-62-29, Exh. A, Atch 24). John Jacobson testified that they met with Dr. Tirado and that "[s]he basically briefed us, I believe, on the history of the EEO complaints." (R3-62-29, Exh. E, p. 40).

Arthur Edwards, Chief of Human Resource Management, testified that Dr. Tirado was present at the December 14 meeting with the on-site team because the team "wanted to review some EEO records." (R3-62-30, Exh. F, p. 14). Dr. Kahane, the Chief of Staff, testified that he "did not recall" any conversation about Dr. Malladi's EEO complaints. (*Id.*, Exh. G, p. 107). Dr. Kahane, however, also testified that he did not think that EEO mate-

rial, which he described as "prohibited material" should have been transmitted to the team members before their arrival. (*Id.*, p. 107). Anderson's request, however, had clearly sought this information. (*Id.*, Exh. D). Moreover, "summaries of EEO complaints filed by Dr. V. Malladi October 1, 1992 to present" were provided to the on-site team with a letter from Mr. Clay, Medical Center Director, to Dr. Anderson dated December 1, 1995, some 13 days before the on-site team arrived, in which Mr. Clay was apparently responding to Dr. Anderson's request for information. (R2-49, Exh. D, Atch 5, p. 2).

The site visit was called for by the TVAMC Management without any internal focus review and without discussing any deficiencies or complaints with Malladi. Summaries of all her EEO cases were sent to that team even before their arrival at TVAMC. The team's report did not verify the statistics, did not verify the negative comments, and did not include any positive comments made by staff members regarding Malladi and her leadership. Malladi wrote a response to the team's report, (R3-62, Exh. A, pp. 37-40, Atch 27), and, under dates of December 20, 1995 and January 22, 1996, the medical center director provided Malladi with two memoranda stating that there were no complaints on file against her (*id.*, Exh. A, p. 38, Atch 29), a fact that directly refuted the site visit report regarding complaints from Malladi's subordinates.

After adopting language strongly critical of the EEO filings, the site review report recommended the removal of Malladi from her position. (R2-49-43). Kahane recommended her permanent reassignment *based on the report.* (R2-49, Exh. C, Atch 27). The Medical Center Director, Mr. Jimmie L. Clay, detailed Malladi away from her service *based on the site review report* and a memoranda from some members of Malladi's staff (R2-49, Exh. D, Atch 8), then permanently reassigned her. (R2-49, Exh. D, Atch 9).

The portion of the site visit report that refers to the EEO filings and is characterized as "merely passing mention" by the VA in its brief in opposition, and which is basically treated as irrelevant by the lower courts, is reported by the district court, at page 8a of the appendix as follows:

> "In discussion with the Chief of Staff, Medical Center Director and the Associate Director, *a strong concern was expressed regarding the inability of the Medical Center leadership to gain cooperation with the current Chief of PM&RS in resolving issues precipitating the site visit. This concern stems from the recent history of EEO complaints filed by the Chief, PM&RS.* Since December of 1992, the Chief, PM&RS has registered a total of 12 EEO complaints against the Director, Chief of Staff, and Associate Director (triad) alleging discrimination on the basis of race, disability and gender. In review of EEO records, the majority of filings stem from the Chief's perceived feeling of discrimination relating to the refusal by triad to provide additional physician staffing to PM&RS. Seven of the complaints have been resolved via a global settlement agreement signed March 30, 1995. The Chief has continued to register complaints to the EEO Commission based on perceived reprisal from the triad in relation to her original complaint. *As a result of the continued filing, the members of the triad feel incapacitated in providing the Chief with adequate direction and assistance in manageemnt of her service.* In discussion with Dr. Torrado, the Staff Assistant for EEO, this continued filing has also burdened the EEO system at the hospital and resulted in excessive provision of resources by the EEO staff to continually review Dr. Malladi's complaints.

(Emphasis added). When this language is viewed in the light of the site review team's recommendation to detail and transfer Dr. Malladi, followed by a chief of staff rec-

ommendation to do so, based on the review team's report, the direct evidence scenario is complete, particularly when the actions of the medical center director are also based upon the report and the ensuing recommendation.

CONCLUSION

It is respectfully submitted that the lower courts have erred in allowing the VA to escape its responsibility under an agreement it entered into with the Petitioner, and that they have further erred in applying the indirect burden-shifting *McDonnell Douglas* analysis to a case that clearly involves direct evidence.

Since the decisions of the lower courts are inconsistent with this Court's prior decisions, it is respectfully submitted that this Court should grant its writ of certiorari and direct the lower courts to order a trial of this cause.

Respectfully submitted,

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